United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2083

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES ex. rel. CHARLES ANGELO SPATARO,

Relator-Appellant

-v-

Docket No. 75-8116

UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF NEW YORK,

Respondent-Appellee

APPELLANT'S BRIEF

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STATEMENT OF FACTS

On October 24, 1974, an Extradition Complaint (Index #1) was filed on behalf of the Canadian Government by the Hon. John T. Elfvin, United States Attorney for the Western District of New York. The Complaint alleged that Charles Angelo Spataro was duly and legally charged with having committed and had been convicted of and sentenced for the crime of arson in Canada and that he has escaped and had been allegedly at large while serving time. That it further alleged that Spataro can be found in the Western New York area and that the crime of arson was a listed offense in a treaty between the United States and Canada.

That on October 24, 1974, a warrant (Index #2) was issued for Spataro's arrest. That on February 21, 1975 the appellant was arrested pursuant to the October 24, 1974 warrant.

The appellant was duly arraigned before the Hon. John T. Curtin and was incarcerated in lieu of $50,000.00 cash bail.

That the appellant's attorney, James J. Michalek and Mr. Richard Mellenger, Assistant United States Attorney for the Western District of New York, acting for Mr. Richard Arcara, United States Attorney for the Western

District of New York met following the arraignment with the Hon. John T. Curtin. At that time, Judge Curtin instructed Mr. Mellenger to procure the necessary identifying exhibits such as fingerprints, and other identifying marks that would positively identify the appellant as being the person sought in the Extradition Hearing. See Index #15 pages 3-4.

That proceedings were held before the Hon. John T. Curtin on the 4th day of March, 1975, pursuant to Article 18 of the United States Code and the appropriate treaties with Canada. See Index #5.

That the only evidence produced by the United States Attorney was various depositions and documents showing that a Charles Spataro was sentenced for a 7 year term for attempted arson and for a 14 year term for conspiracy. In addition, one witness was introduced that identified the appellant as being a prisoner at the Warkeworth Institution. That no further evidence was presented by the United States Attorney and no fingerprints or other identification evidence as requested by Judge Curtin was presented by the Attorney. See Index #5.

That on the 3rd day of April, 1975, Hon. John T. Curtin rendered his decision certifying the Extradition of the appellant and ordered his committment to the United States Marshall pending the issuing of an Extradition

Warrant by the United States Secretary of State. (Index #15)

That on April 10, 1975, the appellant petitioned the Court for a Writ of Habeas Corpus and for a Writ of Certiorari (Index #16) contending that the crime of attempted arson is not a listed offense in a Treaty with Canada and that there was no competent legal evidence shown to warrant a finding of a reasonable ground to believe the appellant was guilty of the acts charged in the Extradition Complaint and further that the government had failed to properly identify the appellant as the person sought by the Extradition Warrant. The appellant also sought a review on his incarceration because there was a variance of the evidence presented at the Extradition Hearing and with those facts alleged in the complaint and that his constitutional rights were deprived in the hearing because of undue publicity.

That a hearing was held on the petitions on April 28, 1975 before the Hon. John T. Curtin. That the aforementioned extradition proceedings MISC. CR. 147 became a part of the record of the petition for Habeas Corpus and Certiorari Civil No. 75-136. That on the 28th day of April, 1975, the petitions by the appellant were denied. That a ten day stay of the Extradition was entered accordingly. (Index #17)

That on May 6, 1975, the appellant filed a Notice of Appeal (Index #18) with the Western District of New York

Clerk's Office and on May 8, 1975 the appellant perfected his appeal to this Court by filing the necessary Pre-Argument Statements.

That on May 8, 1975 the appellant's attorney, James J. Michalek made a Motion in front of the Hon. John T. Curtin requesting a stay of the Extradition pending the outcome of the appeal. Such a stay was denied but the Hon. John T. Curtin did enter a stay until such a time when the motion for a stay could be heard by the United States Court of Appeals for the Second Circuit.

That on May 20, 1975 the appellant's attorney, James J. Michalek, appeared before this Court and motioned for a stay of the Extradition pending the outcome of this appeal. That a stay was issued by this Court and that the matter was set for an immediate hearing on the appeal.

POINTS OF ARGUMENT

I. THE OFFENSE CHARGED IN THE EXTRADITION PROCEEDINGS IS NOT LISTED IN A TREATY BETWEEN THE UNITED STATES AND CANADA.

A. ATTEMPTED ARSON IS NOT EXTRADITABLE UNDER EXTRADITION TREATIES BETWEEN UNITED STATES AND CANADA.

B. LESSER DEGREES OF CRIMES ARE NOT INCORPORATED INTO THE LISTED CRIMES OF THE TREATY AND ARE NOT EXTRADITABLE.

II. THAT THERE WAS NO COMPETENT LEGAL EVIDENCE SHOWN TO WARRANT A FINDING OF A REASONABLE GROUND TO BELIEVE THE APPELLANT WAS GUILTY OF THE CRIME CHARGED IN THE EXTRADITION COMPLAINT.

A. EVIDENCE MUST BE INTRODUCED TO SHOW THAT THE ACTS CHARGED THE RELATOR ARE CRIMINAL IN THE UNITED STATES.

B. THAT THE COMPLAINT OF JOHN T. ELFIN IS AT VARIANCE WITH THE EVIDENCE AS PRESENTED BY THE GOVERNMENT.

C. THAT THE GOVERNMENT FAILED TO PROPERLY IDENTIFY THE APPELLANT AS THE PERSON SOUGHT BY THE EXTRADITION WARRANT.

POINTS OF ARGUMENT

III. THAT THE APPELLANT'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED IN THE EXTRADITION PROCEEDINGS.

A. THE CANADIAN EXTRADITION REQUEST WAS PROMPTED BY POLITICAL MOTIVES AND IF THE APPELLANT IS EXTRADITED HIS LIFE AND SAFETY MAY BE JEOPARDIZED.

I. THE OFFENSE CHARGED IN THE EXTRADITION PROCEEDINGS IS NOT LISTED IN A TREATY BETWEEN THE UNITED STATES AND CANADA.

The appellee had introduced various depositions and documents tending to show that the appellant was convicted of attempted arson and conspiracy. Upon reading and reviewing the applicable treaties (Treaty between the United States and Great Britain, August 22, 1842, 8 Stat. L. 572 and the Convention between the United States and Great Britain, July 12, 1889, 26 Stat. L. 1508) attempted arson is not one of the listed offenses in the treaties.

It is the well settled policy of the United States not to make extradition, except in virtue of expressed stipulations to that effect. 1853, 6 Op. Atty. Gen. 85. That is, an offense, in order to be extraditable, must be a listed offense found in a treaty between the United States and the country demanding extradition. Collier, United States Marshall vs. Vaccaro, 51 F. 2d 17; (4th Cir. 1931); Wright vs. Henkel, 190 U.S. 40; Kelly vs. Griffin, 241 U.S. 6; Bingham vs. Bradley, 241 U.S. 511; Collins vs. Loisel, 259 U.S. 309; Pettit vs. Walshe, 194 U.S. 205; Glucksman vs. Henkel, 221 U.S. 508 and Berstein vs. Gross, Marshall, 58 F. 2d 154 (5th Cir. 1932).

It is the judiciary that determines if the acts charged or crimes alleged come within the Treaties's

listed offenses. In the Matter of Nicholas Lucien Metzger, 46 U.S. 176 (1847), the question of Treaty interpretation is a judicial function and it is not to be foreclosed by interpretation by the Executive or Diplomatic Departments. Charlton vs. Kelly, Sheriff of Hudson County, New Jersey, 229 U.S. 447 (1913).

It is an important element of an extradition hearing that the crime charged be proven to be a listed offense in a treaty.

This function is an integral part of the entire proceeding and if the court does extradite, the foreign nation can only punish or try the relator for no other offense than the one for which he was delivered under the extradition proceeding. Kerr vs. Illinois, 119 U.S. 436 (1886); United States vs. Rauscher, 119 U.S. 407 (1886).

Therefore, it is important that the crime charged be found within the Treaty between the United States and Canada.

A. ATTEMPTED ARSON IS NOT EXTRADITABLE UNDER EXTRADITION TREATIES BETWEEN UNITED STATES AND CANADA.

An "attempt" crime is not the same offense as the principal crime. There is a marked difference as to the elements that must be proven and the severity of the punishment that is eventually given.

Being convicted of attempted arson is therefore

not the same as being convicted of arson.

In the case at bar, the appellant is being accused of having been convicted of attempted arson, a crime carrying an imprisonment of a 7 year term in Canada. According to the Criminal Code of Canada, Section 389.1, an individual guilty of arson is liable to a 14 year term of imprisonment. There is also a difference as to the matter of intent and to the actual participation in the crimes. See Exhibit 13. Therefore, there is a marked difference between the two crimes, they are not one in the same crime.

In the 1842 Treaty the nations were interested in delivering up the greatest criminals, one charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers.

The 1889 Treaty was meant to supplement this list and brought in other crimes such as manslaughter, counterfeiting, embezzlement, fraud, perjury, rape, burglary, piracy, revolt or conspiracy to revolt, etc. Nowhere in the supplementary treaty has attempted arson been included or for that matter any "attempt" crime.

The language of the treaty cannot be enlarged by interpretation so as to include crimes which do not come within the limitation which the signatures of the treaty

have expressly created. Tucker vs. Alexandroff, 183 U.S. 436; Doe vs. Braden, 16 How. 657; People ex rel. Barlow vs. Curtis, 50 N.Y. 321.

When the crime is listed in the Treaty the person being held for extradition must be shown to be the principal offender, the one who, based on the evidence of criminality is guilty or has a likelihood of being proved guilty of the crime. Collier, U.S. Marshall vs. Vaccaro, 51 F 2d 17 (4th Cir. 1931).

In the case at bar the evidence presented by the Government does not prove that the appellant was guilty of arson or was the principal offender or the prime participant in the offense.

Therefore the appellant cannot be extradited under these treaties because the offense of attempted arson is not an extraditable offense and the government failed to show that the appellant was a principal actor in the crime.

B. LESSER DEGREES OF CRIMES ARE NOT INCORPORATED INTO THE LISTED CRIMES OF THE TREATY AND ARE NOT EXTRADITABLE.

The crime of arson does not incorporate the lesser degrees of the crime, such as attempted arson. Extradition is only meant to deliver up the principal actors or the greater criminals to the requesting nation.

In Re: Kelly, Fed. Case #7,655, 2 Low. 339, 9 Am. Law Rev. 167.

In Kelly the Court stated that one charged with manslaughter could not be delivered up under the 1842 Treaty with Great Britain because manslaughter was not a listed crime under the Treaty. Murder is one of the listed offenses of the Treaty but the Court stated that murder did not include the lesser crimes falling thereunder.

The courts have held that the crime must be specified in the Treaty if it is to be extraditable. In In Re: Dubraca vs. Paniagua, 33 F 2d 181 (Ed. Pa., 1929) it was held that a case made out for seduction cannot be extraditable under a treaty listing kidnapping.

Therefore the crime of arson, as listed in the treaty, does not include the lesser degree of the crime, such as attempted arson.

II. THAT THERE WAS NO COMPETENT LEGAL EVIDENCE SHOWN TO WARRANT A FINDING OF A REASONABLE GROUND TO BELIEVE THE APPELLANT WAS GUILTY OF THE CRIME CHARGED IN THE EXTRADITION COMPLAINT.

In order for the Court to have jurisdiction over the Extradition of an individual the offense charged must be within a treaty to which the United States is a party and that the judge hearing the extradition acts upon competent and adequate evidence. Bingham vs. Bradley, U. S. Marshall for the Northern District of Illinois, 241 U. S. 511 (1916).

In the case at bar there was no competent and adequate evidence presented by the Government.

The only evidence presented by the Government besides one witness, consisted of various documents and papers. That these papers and documents presented by the Government dealt only with the conviction record of the person sought in these proceedings. That included among these papers were various affidavits that stated what constituted a crime of arson, attempted arson and conspiracy, etc. in Canada. See Index # 1 and 5to14.

Not one act of the person accused, nor any of his alleged criminal conduct in Canada was stated in any of the evidence in papers that were presented by the Government. That since none of the acts that constituted

these convictions were stated in the evidence how is the Court to determine the "evidence of criminality" as is required under the treaties with Canada.

It has been stated, concerning the requirement of criminality under the British Extradition Treaties, by the report of a Royal Commission created in 1877 by Queen Victoria to look into and consider the workings of the treaties of extradition:

> It is and always must be neccessary that a prima facie case shall be made out before a magistrate in order to support the application for extradition. But the English magistrate cannot be expected to know or interpret the foreign law. It is not desirable that he should be required to do more than to see that the facts proved constitute prima facie an offense which would have been within the judicial cognizance if done in this country. See Factor vs. Laubenheimer, Butler, J. dissent, 290 U.S.

In the case at bar no such determination can be made by an American Judge who is unaware of any of the facts that constituted the crimes alleged in these proceedings or in the former Canadian proceedings.

A. EVIDENCE MUST BE INTRODUCED TO SHOW THAT THE ACTS CHARGED THE RELATOR ARE CRIMINAL IN THE UNITED STATES.

The Supreme Court has steadfastly held that a fugitive will not be extradited unless the facts alleged against him in the demanding country are there made criminal, constitute a crime covered by the treaty and are

denounced as a crime either by some act of Congress or by the laws of the State where the fugitive is found. Wright vs. Henkel, 190 U.S. 40; Kelly vs. Griffin, 241 U.S. 6; Bingham vs. Bradley, 241 U.S. 511; Collins vs. Loisel, 259 U.S. 309; Pettit vs. Walshe, 194 U.S. 205; Gluckman vs. Henkel, 221 U.S. 508.

In the case at bar there was no evidence as to the facts that constituted the crime of attempted arson or conspiracy. See Index #1 and 5 to 14. Since no facts as to these charges were introduced by the United States Attorney there is no way to conclude that such acts are criminal within the State of New York and in the United States.

In Collier, United States Marshall vs. Vaccaro, 51 F. 2d 17 (4th Cir. (1931) the Court held that the evidence presented was insufficient to extradite the individual for murder under the 1842 Webster-Ashburton Treaty with Great Britian. The Court's main reason was that the Government failed to show that the individual was a participant in the crime or that he aided or abetted in the crime, essentially the Government failed to show the acts that constituted the crime of murder.

In the Vaccaro Case the Court eventually held the individual for extradition, but only on kidnapping grounds. In their discussion of kidnapping the Court

stated that

> kidnapping is an extraditable offense under the Webster-Ashburton Treaty of 1842 provided that there is evidence of criminality as according to the laws of the place where the fugitive was found would justify his committment for trial if the crime had been committed there. 51 F 2d at 20-21.

In the case at bar we don't know if the acts charged would justify the appellant's committment for trial. We don't know because nothing was ever introduced on this matter. The only evidence we have is a conviction record.

As then, Secretary of State, Calhoun, stated in a letter to Lord Aberdeen, then Foreign Secretary at the time when these treaties were being negotiated, talking about a conviction and indictment record used in an extradition,

> it is not enough for us to know that an American jury thought the parties guilty. We ought to know the grounds upon which they thought them guilty. What may constitute the crime of murder in Florida may be very far from doing so according to the British laws. Factor vs. Laubenheimer, Butler, J. dissent, 276 U.S. at 320.

Therefore, because we do not know the specific acts that were allegedly committed in Canada and which eventually lead a judge or a jury to enter a conviction against the accused in Canada, an American judge cannot determine if the same acts or conduct is criminal or constitutes a crime within New York State or within

the United States.

In the case at bar we have no such evidence presented, nothing is presented as to the alleged conduct or to the eventual acts or facts that was presented to a jury that based on such facts was a conviction entered. Because the government has failed to produce such facts and has failed to produce that such facts or conduct is criminal within the United States or within New York State, evidence presented by the government does not satisfy the evidence of criminality as required under the treaties with Canada.

B. THAT THE COMPLAINT OF JOHN T. ELFIN IS AT VARIANCE WITH THE EVIDENCE AS PRESENTED BY THE GOVERNMENT.

The government introduced a record of conviction alleging attempted arson and conspiracy. The complaint stated arson. This is a fatal variance because the very purpose of the complaint is to give the court and the individual sought notice as to what the proceedings are about and since the crime used in the complaint is misleading, no such notice was given to the court or to the individual sought.

A complaint seeking the issuance of a warrant for extradition to a foreign country must allege facts sufficient to apprise the defendant of the nature of the charge against him and to show the court that an extraditable offense has been committed. In Re Wise, 163 F. Sup. 366.

That this complaint is misleading since it tries to make the crime charged one of the extraditable offenses of the Treaty. Also no facts of the crime were ever stated in the complaint.

As stated in Ex Parte Sternaman, 77 Fed Rep. 595 and cited in Yordi vs. Nolte, 215 U.S. 22,

> "If the offense be one of the Treaty crimes, and if it be stated clearly and explicitly so that the accused knows exactly what the charge is, the complaint is sufficient...."

Because the complaint alleges the wrong crime and since it did not include any of the offenses that were introduced into the evidence and since no facts were presented as to what constituted the offenses, neither the court nor the appellant was adequately apprised of the nature of these proceedings. Therefore, the complaint is insufficient as a matter of law and is at a fatal variance with the evidence.

C. THAT THE GOVERNMENT FAILED TO PROPERLY INDENTIFY THE APPELLANT AS THE PERSON SOUGHT BY THE EXTRADITION WARRANT.

The indentification of the accused as being the one sought in an extradition proceeding is a crucial element in an extradition hearing. Every step must be taken to assure the proper indentification of the accused. Gluchsman vs. Henkel, 221 U.S. 508.

The HONORABLE JOHN T. CURTIN, understood the importance of this element,

> at the time of arraingnment, I informed the Assistant United States Attorney that indentification was a most important consideration and stated the best evidence would be a fingerprint indentification.
>
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That no such evidence was introduced by the Government.

A witness was brought forth that identified the appellant as being present at Warkeworth Institution in 1974. There was no further evidence as to how the appellant and as to why the appellant was present at Warkeworth Institution.

Identification is very important in the case at bar because of the time elements involved.

The appellant is being accused of leaving Canada in June of 1974, the arrest warrant in Buffalo, New York wasn't signed until October 24, 1974. The appellant wasn't arrested until February 21, 1975, some eight (8) months after his alleged exit and some four (4) months after a warrant was issued.

During this time the Appellant resided at his Buffalo residence. The appellant also had an automobile registered in his name in the State of New York and was

employed openly in the area.

Because of these time elements the indentification of the appellant here is crucial.

The evidence presented by the government was not sufficient to satisfy the indentification requirement and did not meet the standard orginally set by the HONORABLE JUDGE CURTIN. Therefore, the appellant was never properly identified as the individual sought under the Extradition Warrant.

III. THAT THE APPELLANT'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED IN THE EXTRADITION PROCEEDINGS.

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. Snyder vs. Massachusetts, 291 U.S. 97.

The conditions and the setting of these extradition proceedings were not condusive to the fairness principal that is to be accorded such hearings under due process of law of the Fifth Amendment.

The various local and Canadian newspapers printed numerous stories concerning the appellant and an "Alleged" link to organized crime. That newspapers told of the appellant's wife being a niece to a Chieftan in organized crime.

That such publicity, which is totally false, has created an atomosphere of apprehension and doubt and have casted extreme pressure on local law authorities to see to it that these proceedings because a "lesson" for other members of organized crime.

The Supreme Court has held that such adverse publicity, when it influences or effects the decision makers can possibly be a denial of due process. Costello vs. United States, 350 U.S. 359.

The adverse publicity in this case has deprived the appellant of a fair and impartial hearing and it may have effected the decision making involved. Therefore, if this decision reached in the extradition hearing is allowed to stand the appellant will be deprived of his due process rights.

A. THE CANADIAN EXTRADITION REQUEST WAS PROMPTED BY POLITICAL MOTIVES AND IF THE APPELLANT IS EXTRADITED HIS LIFE AND SAFETY MAY BE JEOPARDIZED.

That throughout the past year the various Canadian officials were vehemently attacked by the public, press and members of the Parliament and of the Cabinet. That the only reason extradition proceedings were begun was because the Canadian Penitentiary officials were being severelly criticized for their various programs.

That such political motives should not be the grounds for extradition and this Country cannot allow one of its citizens to be used as a political character.

As stated in Article II of the 1889 convention between the United States and Canada:

> A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requistion for his surrender has in fact been made with a view to try to punish him for an offense of a political character.

If the appellant is extradited there may be a reprisal by those authorities who were vehemently attacked. That the life and safety of the appellant may be endangered.

Therefore, in respects to the constitutional rights that the appellant possesses by reason of his United States citizenship and because of the political prompting of this proceeding the appellant should not be extradited.

CONCLUSION

For the aforementioned reasons the appellant is asking this court to reverse the decisions of JUDGE CURTIN, that of April 3, 1975 in which he certified the extradition of the appellant and ordered his committment and that of April 28, 1975 when the petition for Habeas Corpus was denied and to dismiss the Extradition Complaint and the proceeding brought thereunder and for such other and further relief that this court deems just and proper.

DATED: Lackawanna, New York
May 29, 1975

Respectfully submitted,

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